Supreme Court, U.S.
FILED
JUN 2 1994
OFFICE OF THE CLERK

No. 93-1827

In The

Supreme Court of the United States

October Term, 1993

JERRY LOKAY,

Petitioner,

v.

AMERICAN REAL ESTATE CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth District Of Texas

BRIEF OF RESPONDENT, AMERICAN REAL ESTATE CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, AMERICAN REAL ESTATE CORPORATION ("AREC"), prays that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth District of Texas be denied.

OPINIONS BELOW

Petitioner's Appendices set forth the relevant opinions of the courts below.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Due Process Clause, U.S. Constitution, Amendment XIV, Section 1: " . . . ; nor shall any State deprive any person of life, liberty or property without due process of law; . . . "

RULE 215(5) Texas Rules of Civil Procedure: "Failure to Respond to or Supplement discovery. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the Trial Court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record."

STATEMENT OF THE CASE

Petitioner Lokay, a realtor employed by Respondent, AREC, borrowed the company pick-up truck for personal use on his day off. Petitioner was injured in a one (1) vehicle accident which occurred while he was driving.

Prior to the commencement of evidence at trial, Respondent moved in Limine to exclude the testimony of any witnesses not properly disclosed more than thirty (30) days before trial, as required by Rule 215(5) of the Texas Rules of Civil Procedure. Petitioner had never supplemented his discovery responses to list Ross Cox or Mrs. M.L. Nixon as witnesses. The motion was sustained after a "good cause" hearing was held, and as a result, witnesses Cox and Nixon were excluded.

PROCEEDINGS AT TRIAL

Subsequent to the Court's ruling on the Motion in Limine, evidence was presented to the jury, arguments were had and a defense verdict resulted. A Judgment on the verdict was duly entered.

PROCEEDINGS FOLLOWING TRIAL

Petitioner filed a motion for New Trial which was denied. Petitioner appealed to the Court of Appeals for the Ninth District of Texas and the Judgment of the Trial Court was affirmed. Petitioner applied for Writ of Error to the Texas Supreme Court and for rehearing. Both were denied. All of Petitioner's post trial motions focused on

the exclusion of the referenced witnesses and all said post trial motions and appeals were denied.

REASONS FOR DENYING THE WRIT

Not unlike Rule 26(3) of the Federal Rules of Civil Procedure, Rule 215(5) of the Texas Rules of Civil Procedure requires disclosure of witnesses at least thirty (30) days before trial. Unlike the Federal Rule, Texas Rule 215(5) does not require unilateral disclosure, but only requires disclosure in response to a discovery request. The sanction in either case is the same – exclusion of the non-disclosed evidence or witness. Rule 37(c)(1), Fed. R. Civ. P.; Rule 215(5) Tex. R. Civ. P. The Federal rule allows an exception for failure to disclose based on "substantial justification". Rule 37(c)(1), Fed. R. Civ. P. The Texas rule allows an exception for failure to disclose based upon good cause shown. Rule 215(5), Tex. R. Civ. P. Rules such as these are designed to streamline litigation, reduce costs, insure prompt and just resolution of disputes and encourage full disclosure.

During the course of discovery, Respondent served interrogatories on Petitioner. Interrogatory No. 16 inquired as follows:

> "Please state the names and addresses of all persons known by you or your attorneys to have knowledge of any fact relevant to the matters or incidents complained of in your suit, together with a brief description of the nature and source of such person's knowledge." (Tr. Vol. 1, p. 15).

Plaintiff answered the interrogatory as follows:

> "Sandy Lokay, Jerry Lokay; they were in the wreck; investigating police officers, ambulance personnel and wrecker (sic), Travellers (sic) Insurance adjuster, American Real Estate, treating physicians; Joseph Caraway; Jodi Caraway; Juanita Dorothy R. Heel; Brenda Arena; Judy Hargrove, Bill Christian; Gerald Farhah (sic); Lori Millicent." (Tr. Vol. 1, p. 25).

At trial, Petitioner attempted to call Ross Cox and Mrs. M.L. Nixon by deposition. These witnesses were not disclosed in response to the referenced interrogatory. Pursuant to the Court's ruling in Limine, the witnesses were excluded.

Petitioner did not deny knowledge of the rule or his lack of compliance. Petitioner claims instead that the rule is unfair. This is the thrust of Petitioner's plea.

The application of the rule by the Court did not result in a denial of due process under the U.S. or Texas Constitutions. Petitioner claims the "good cause" hearing conducted by the Court violated his rights under the 14th Amendment to the U.S. Constitution. Assuming arguendo that Petitioner can establish a protected interest and entitlement to a hearing, due process of law requires only some kind of hearing prior to deprivation of a significant property interest. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 19, 98 S.Ct. 1554, 1565, 56 L.Ed.2d 30 (1978). A hearing was had, in fact several hearings were had, before and during the trial in question on the issue of exclusion of witnesses Cox and Nixon. Petitioner sets out in his appendix a partial transcript of the initial hearing on the exclusion of the witnesses in

question. There is no doubt Petitioner was afforded a hearing at a reasonable time presided over by the trial judge before the witnesses in question were excluded. Petitioner failed to establish good cause for the lack of disclosure. There was no "automatic" exclusion of evidence, as argued by Petitioner. Exclusion was ordered only after Petitioner had his opportunity to be heard and failed to establish good cause.

Petitioner additionally argues that because the witnesses in question had been deposed by Respondent, they were therefore "disclosed". This issue has been litigated before, and the Texas Supreme Court has spoken:

> A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory. Thus, even the fact that a witness has been fully deposed, and only his or her deposition testimony will be offered at trial, is not enough to show good cause for admitting the evidence when the witness was not identified in response to discovery.

Sharp v. Broadway National Bank, 784 S.W.2d 669, 671 (Tex. 1990).

The Court properly applied Rule 215(5) to this case. Due process does not mandate a favorable result to Petitioner, rather it requires a fair and reasonable opportunity to be heard. Petitioner, not due process, must supply the good cause. Where good cause is not established, the rule provides that the witnesses are to be excluded. The Court's ruling was correct.

CONCLUSION

Petitioner had notice of the rule and failed to comply. Petitioner failed to establish good cause and the rule's sanctions were applied. Due process was not violated. Petitioner's witnesses were not "silenced" by the Court, but by counsel's non compliance with the rule. Petitioner's due process rights were amply protected and therefore, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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